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No._____

In the Supreme Court of the United States

October Term, 1993

STANDARD FIRE INSURANCE COMPANY,

Petitioner,

v.

FRANK BURNABY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a state court constitutionally award massive punitive damages based on a jury finding of "fraud," where no fraud cause of action has been pleaded or proved and where no fraudulent conduct, as defined in the state's punitive damages statute, has even been alleged?

LIST OF PARTIES TO THIS PROCEEDING

The only parties to this proceeding are petitioner Standard Fire Insurance Company, the defendant in the state courts, and respondent Frank Burnaby, the plaintiff below.

The Standard Fire Insurance Company is a wholly owned subsidiary of Aetna Life and Casualty Company of Hartford, Connecticut.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable William H. Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, the Standard Fire Insurance Company, respectfully prays that a writ of certiorari be issued to review the decision rendered by the Court of Appeal of the State of California, Second Appellate District, Division One. The Supreme Court of California has denied review. The case presents an important issue involving the right to procedural due process of law, in the context of an award of punitive damages based on a finding of "fraud," where

no fraud cause of action was pleaded or proved, and where the defendant had no notice of any charge of fraudulent conduct.

OPINION BELOW

The opinion of the California Court of Appeal, affirming an award of punitive damages against the petitioner, was reported as *Burnaby v. Standard Fire Insurance Company,* 16 Cal.App.4th 135, 20 Cal.Rptr.2d 44 (1993). A copy of this opinion, as published in the official California advance sheets, is Appendix A to this petition.

Following the decision of the Court of Appeal, the defendant Standard Fire Insurance Company filed a petition for review in the California Supreme Court. (Appendix H). The state Supreme Court denied review, but ordered that the opinion of the Court of Appeal not be published, thereby removing it from the body of California law. (Appendix B.)

JURISDICTION

The California Court of Appeal filed its opinion on June 1, 1993. It denied rehearing on June 30, 1993. (Appendix D.) The California Supreme Court filed its order denying review and directing the opinion of the Court of Appeal not to be published on September 2, 1993. (Appendix B.) On that date, the judgment of the trial court (Appendix C), became final as to the State of California.

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 *U.S.C.* section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves the Fourteenth Amendment to the Constitution of the United States. The relevant portion of this amendment is set forth in Appendix J. The case also involves application of California *Civil Code* section 3294, the state's punitive damages statute, the full text of which is set forth in Appendix I.

STATEMENT OF THE CASE

1. The Constitutional Violation.

Plaintiff Frank Burnaby successfully sued his homeowner's insurer, defendant Standard Fire Insurance Company, claiming that the defendant was obligated to pay him, under a homeowner's policy, for landslide damage to his single family residence. The jury decided in his favor on causes of action for breach of contract, breach of the covenant of good faith and fair dealing ("bad faith"), breach of fiduciary duty, and violation of the California *Insurance Code*. He recovered the amount of money he claimed was due under his insurance contract, plus generous extracontractual damages to compensate him for his emotional distress and for his attorney's fees.

After the plaintiff's victory in the first phase of trial, the case proceeded to a second phase of trial devoted solely to the question of punitive damages. Although the jury found that the defendant insurer had not acted with "malice" or "oppression," it found that it was guilty of "fraud." This finding was made even though no fraud cause of action had been pleaded, proved, or submitted to the jury. Moreover, there had not even been any charge of fraudulent conduct, as defined in the California punitive damages statute, in the

pleadings of the plaintiff. Nonetheless, state courts have upheld the jury's award of a half million dollars in punitive damages based on "fraud."

The Standard Fire Insurance Company claims that the award of punitive damages is constitutionally impermissible. Notice of charges is an essential component of due process of law, and there never was any proper notice in this case. The defendant was never apprised of the possibility that the "fraud" portion of the California punitive damages statute could be interpreted so as to allow recovery of punitive damages based on a finding of "fraud" without any fraud cause of action. Moreover, the defendant was never charged with any fraudulent conduct in the plaintiff's operative second amended complaint.

Because of the absence of the constitutional requirement of notice, the award of punitive damages cannot be permitted to stand.

2. The Denial of the Burnaby Claim for Landslide Damage.

Mr. Frank Burnaby is a businessman, who works as a landscape lighting designer. [3 R.T. 2.][1] He is the owner of a single family residence located at 20743 Rock Point Way, Malibu, California, a ranch style house with three bedrooms and two bathrooms. It was built in the early 1960's, and was purchased by Mr. Burnaby in October of 1979. [3 R.T. 3.]

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[1] The abbreviation "R.T." designates the reporter's transcript, while "C.T." refers to the clerk's transcript. Volume numbers precede these abbreviations, and page numbers follow them.

On September 9, 1983, at a time when Mr. Burnaby's house was uninsured, the County of Los Angeles sent notice to certain homeowners in the Big Rock Mesa area of Malibu, California, concerning a public meeting to be held on September 19, 1983. [9 C.T. 3287.] The notice, signed by the County Engineer, indicated that the County had "detected significant evidence that an incipient landslide may be developing in the Big Rock Mesa area." [9 C.T. 3287.] Mr. Burnaby did not receive notice of the public meeting, but learned of it from neighbors who lived to the east of his house, and he attended the meeting. [3 R.T. 10-16.] He saw a map presented at the meeting, and learned that his house was just outside of the tentative boundaries of the landslide. [3 R.T. 16-17.]

In the wake of the public meeting of September 19, 1983, Mr. Burnaby did three things.

First, he filed claims against the County of Los Angeles and various other governmental entities, whose conduct was alleged to have caused the landslide. [8 C.T. 2880-2883; 9 C.T. 3116-3127.] In his claim against the County, which was dated December 16, 1983, and filed on December 19, 1983, Mr. Burnaby alleged that his house had been damaged in the amount of $1.1 million. He stated that the damage "commenced on or about September 19, 1983, is continuing to this date, and appears to be continuing into the foreseeable future." [8 C.T. 2880.] Similar claims were filed against the Flood Control District, the State of California, and the state's Coastal Commission. [9 C.T. 3116-3126.]

The second step taken by Mr. Burnaby after the public meeting of September 19, 1993, was to claim coverage for landslide damage to his house under a long

expired homeowner's policy issued by defendant Standard Fire Insurance Company, which had been in effect from November 28, 1981. to November 28, 1982. [1 C.T. 175-246; 9 C.T. 3264-3283.]

The third and final step taken by Mr. Burnaby after the fateful meeting of September 19, 1983, pursuant to the advice of his attorney, was to try to buy a new policy of insurance. [3 R.T. 24-28.] He was able to secure such a policy from Standard Fire Insurance Company, which issued a policy with a policy period of December 20, 1983, to December 20, 1984. [8 C.T. 2891-2915.]

The key issue in determining coverage for landslide damage is the determination of the date of loss.[2] The Standard Fire Insurance Company determined that the correct date of loss for Mr. Burnaby's claim was during the period of time in which he was uninsured. The claim was therefore denied in a letter dated August 7, 1985, from Mr. Jay Robinson, Standard's coverage attorney, to one of the attorneys representing Mr. Burnaby. [10 C.T. 3751-3753.] In his letter, Mr. Robinson asserted that the appropriate date of loss fell prior to December 20, 1983. As noted above, Mr. Burnaby had asserted in his claims against the County of Los Angeles and other governmental entities, that the date of loss was September 19, 1983. An additional ground for denial of the Burnaby claim, as stated in Mr. Robinson's letter, was that Mr. Burnaby had concealed essential information at the time that he applied for his second

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[2] Under California law, there can be only date of loss in first party claims of the type brought by Mr. Burnaby. *Prudential-LMI Commercial Insurance Company v. Superior Court*, 51 Cal.3d 674, 274 Cal.Rptr. 387 (1990).

Standard homeowner's policy, the one that took effect on December 20, 1983.

3. The Operative Pleadings.

Mr. Burnaby filed his operative second amended complaint [1 C.T. 175-246], on October 22, 1986. A copy of this pleading is Appendix E.

In the second amended complaint, Mr. Burnaby alleged that he was the owner of a house in Malibu, California; that defendant Standard Fire Insurance Company had issued two policies on the house; that the Burnaby residence is located on a hillside which is the site of an ancient landslide which reactivated as early as 1978, destabilizing the land underneath the house; that the landslide is progressive and continuing; that the house can neither be sold nor rented; and that "because the damage has been continuous, progressive and deteriorating [*sic*] during more than one policy period, Standard is liable under both policies." [1 C.T. 177-184.][3]

The second amended complaint contained six separate causes of action, although several of them were no longer in the case at the time of trial. The second cause of action was entitled "fraud." [1 C.T. 187-188.] In this cause of action, it was alleged that the defendant's agent, in a sales presentation, made false representations with respect to the scope of insurance coverage, on which Mr. Burnaby relied in entering into his insurance contracts. There was no

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[3] Since there can be only one date of loss on a claim of the type asserted by Mr. Burnaby, the effort to place the date of loss during two separate time periods represented a legal impossibility. *Prudential-LMI Commercial Insurance Company v. Superior Court,* 51 Cal.3d 674 (1990).

allegation of fraud in the denial of Mr. Burnaby's claim, however. In any event, the second cause of action for "fraud" was abandoned before trial, as was the claim of intentional infliction of emotional distress. [5 C.T. 1803.] As of the end of the first phase of the trial, there were four theories of recovery presented to the jury: breach of contract, "bad faith," breach of fiduciary duty, and violation of the California *Insurance Code*.

In paragraphs 38, 45, and 51 of his second amended complaint, Mr. Burnaby stated the following:

> "Standard has acted with conscious disregard of Mr. Burnaby's rights, intending to vex, injure, or annoy him. Those actions are oppressive, fraudulent, or malicious. Standard's conscious disregard of Mr. Burnaby's rights entitles him to punitive damages." [1 C.T. 191, 194, 197.]

Although the word "fraudulent" appears in the second amended complaint, attached to the causes of action for "bad faith," breach of fiduciary duty, and violation of the *Insurance Code*, there is no allegation whatsoever in any of these causes of action of any particular fraudulent conduct. No mention is made of any intentional misrepresentation, deceit, or concealment of a material fact that the defendant was bound to disclose. No claim of detrimental reliance is asserted. Rather, the boilerplate language quoted above is not supported by any factual allegations.

Prior to trial, the court granted, in part, Standard's motion for summary adjudication of issues. [4 C.T. 1313-1316.] In a signed order, the court determined that Mr. Burnaby's claim for property damage under the first Standard policy, the one with effective dates of November

28, 1981, to November 28, 1982, was time barred by the applicable one year contractual statute of limitations, thereby precluding coverage under the policy as a matter of law. [4 C.T. 1466-1468.] As a result of this ruling, the issue of determining the correct date of loss was simplified. Either it was in the several months prior to December 20, 1983 (as Mr. Burnaby asserted in his governmental claims), or it was after that date (during the policy period of Standard's second homeowner's insurance policy).

4. The First Phase of the 1989 Jury Trial.

The long and tumultuous trial began on August 14, 1989.[4]

Numerous witnesses testified, including the plaintiff, his insurance agent, the defendant's underwriters, the employees of the defendant who handled the Burnaby claim, insurance experts, legal experts, and geological experts. There was sharp conflict in the evidence, on issues as diverse as the physical condition of the Burnaby residence, the conversations between Mr. Burnaby and his insurance agent, underwriting procedures, and claims handling procedures.

The jury apparently believed Mr. Burnaby's version of events with respect to the purchase of his second Standard policy, rejecting the defendant's claim of conceal-

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[4] The case generated a 20 volume clerk's transcript and a 16 volume reporter's transcript, both of which are on file in the Court of Appeal. However, very little of this substantial record is germane to the remaining issue which the petitioner seeks to present to the Supreme Court of the United States. In fact, virtually all of the relevant portions of the record appear in the appendix to this petition.

ment. Thus, the insurance policy was found to be in effect, and the critical issue was determination of the date of loss.

The jury allowed Mr. Burnaby to change his version of the facts. It overlooked the facts stated in his governmental claims, and also did not hold him to his previous statements under oath. In his opening statement to the jury, Mr. Burnaby's trial attorney revealed that some of his client's answers during the statements under oath were "just plain wrong." [1 R.T. A266.] The jury apparently agreed, and relied on Mr. Burnaby's trial testimony, in which he placed the date of loss in 1984, during the policy period of the second Standard homeowner's policy.

In addition to ruling in favor of the plaintiff on the claim of breach of contract, the jury found "bad faith," breach of fiduciary duty, and violation of the *Insurance Code* on the part of the defendant. These claims hinged on the contention that, in adjusting the Burnaby claim, the defendant should have accepted the evidence placing the date of loss of the Burnaby residence during 1984, disregarding all conflicting evidence, including Mr. Burnaby's own statements in his governmental claims. As noted above, the original cause of action for "fraud" was abandoned before trial, and there was no evidence on the subject and no claim of fraud was submitted to the jury during the first phase of the trial.

The jury returned its initial special verdict on October 27, 1989. [7 C.T. 2647-2651.] It answered sixteen specific questions, all of them in favor of the plaintiff. The jury found that Mr. Burnaby was entitled to contract damages, including prejudgment interest, in the total amount of $235,990.86 [7 C.T. 2649], and extracontractual compensatory damages (for emotional distress and

attorney's fees) in the amount of $600,000.00. [7 C.T. 2651.][5]

5. The Second Phase of the Trial Concerning Punitive Damages.

After the jury's initial verdict was returned, the punitive damages phase of the trial began. Only one witness was called, who testified as to the total net worth of Aetna Life and Casualty Company, the parent company of Standard Fire Insurance Company. [16 R.T. 3437-3461.] He said that the total net worth of the parent company was $6,686,800,000.00. [16 R.T. 3450.]

The issue of punitive damages was submitted to the jury with a standard instruction from California's *Book of Approved Jury Instructions* (BAJI 7th ed.). In particular, the court decided to give BAJI instruction number 14.71, over the objections of the defendant's attorney.

The trial judge and the attorneys for the parties discussed instructions and verdict forms for the second phase of the trial, as follows:

> "*THE COURT*: LET ME JUST FINISH WHAT WE ARE DOING.
>
> "THE SPECIAL VERDICT -- I WOULD USE THE DEFENDANT'S FORM EXCEPT THAT THE DEFENDANT'S FORM APPEARS TO OMIT THE ELEMENT OF FRAUD.

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[5] The special findings of the jury, rendered after each of the two phases of the trial, are recited in the judgment of the trial court. A copy of the judgment is Appendix C.

"*MR. WEATHERUP*: RIGHT. I WANT TO ADDRESS THAT.

"IT SEEMED TO ME THAT THE CAUSE OF ACTION FOR FRAUD WAS ABANDONED AT THE BEGINNING OF THE TRIAL, AND THERE'S NO EVIDENCE OF FRAUD IN THIS CASE. . . . FRAUD AS DEFINED IN THE CIVIL CODE AND IN THE PUNITIVE DAMAGES STATUTE REQUIRES THAT A PERSON BE INDUCED TO ENTER INTO A TRANSACTION BY FRAUD, AND THAT ANY MISREPRESENTATION, ASSUMING THAT THE JURY WERE TO VIEW SOME OF THE EVIDENCE AS SUPPORTING A FINDING OF MISREPRESENTATION, IS NOT ENOUGH TO GET UNDER THE PUNITIVE DAMAGES STATUTE.

"THE B.A.J.I 14.71, DEFINES FRAUD AS AN INTENTIONAL MISREPRESENTATION, DECEIT, OR CONCEALMENT OF A MATERIAL FACT KNOWN TO THE DEFENDANT WITH THE INTENTION ON THE PART OF THE DEFENDANT OF THEREBY DEPRIVING A PERSON OF PROPERTY OR LEGAL RIGHTS OR OTHERWISE CAUSING INJURY.

"AND IT HAS TO BE IN CONNECTION WITH A TRANSACTION.

"I THINK THE GENERAL LAW OF FRAUD IS APPLICABLE. IT JUST CAN'T

BE A MISREPRESENTATION IN THE ABSTRACT, SUCH AS THE PLAINTIFF'S ARGUMENT THAT MR. ROBINSON'S RESCISSION LETTER HAD MISREPRESENTATIONS.

"EVEN IF THAT'S TRUE, WHICH THE DEFENDANT DENIES, THAT'S NOT FRAUD BECAUSE MR. BURNABY DID NOT ENTER INTO ANY TRANSACTION BASED ON THAT." [16 R.T. 3413-3414.]

Apparently, the judge was not persuaded by the argument made by the attorney for the defendant. He decided to give BAJI instruction number 14.71. [16 R.T. 3416-3417.]

The full text of BAJI instruction number 14.71, as given by the court, appears in Appendix F. The instruction authorized an award of punitive damages if the defendant was "guilty" of "fraud." The term "fraud" was defined for the jury as "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury."

6. The Verdict on Punitive Damages.

On October 31, 1989, the jury returned a special verdict on punitive damages. [8 C.T. 2737.] The jury found that the defendant had not acted with "malice" or "oppression," but found it guilty of "fraud." [8 C.T. 2737.] The amount of punitive damages assessed was $500,000.00. [8 C.T. 2737.]

7. The Judgment of the Trial Court.

The defendant filed a timely motion for a new trial. The trial judge determined that the compensatory damages were excessive, and the plaintiff consented to a reduction in the amount of such damages from $600,000.00 to $200,000.00. [8 C.T. 2747-2752.] The judgment was accordingly amended. As amended, the judgment included contract benefits and prejudgment interest in the amount of $235,990.86, extracontractual compensatory damages in the amount of $200,000.00, costs and disbursements in the amount of $79,045.00, and punitive damages in the amount of $500,000.00, for a total judgment of $1,014,990.31. [8 C.T. 2732-2738.] From this judgment, the defendant appealed, on January 12, 1990. [8 C.T. 2753-2755.]

8. The Decision of the California Court of Appeal.

On appeal, the defendant raised numerous issues, mainly issues of state law. It challenged the award of punitive damages on both state and federal grounds, arguing that, if correctly interpreted by the trial court, the punitive damages statute was unconstitutional as applied in the present case.[6]

The Court of Appeal acknowledged the invalidity of the plaintiff's breach of fiduciary duty claim, but found the error harmless. 16 Cal.App.3d at 151-152; 20 Cal.Rptr. 44 at 53-54. All other claims of error were rejected.

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[6] Appendix G is an excerpt from the appellant's opening brief filed in the Court of Appeal on February 19, 1992. The excerpted portion of the brief is devoted to the propriety of the award of punitive damages.

The Court of Appeal disposed of the challenge to the award of punitive damages in section VIII of its opinion. It found that punitive damages for "fraud," under California *Civil Code* section 3294, could be awarded without any fraud cause of action. In fact, according to the Court of Appeal, exemplary damages are "properly awardable in "any 'ex delicto' action," which "arises of fault, misconduct or malfeasance." 16 Cal.App.4th at 154; 20 Cal.Rptr. at 56. The court concluded that "there is ample evidence, which is reviewed hereinafter, to justify the jury award of exemplary damages on the basis of intentional misrepresentation and/or concealment of a material fact with intent to deprive respondent of property, to wit, insurance proceeds, thereby constituting fraud within the meaning of Civil Code section 3294, subdivision a." 16 Cal.App.4th at 155; 20 Cal.Rptr. at 56. However, the Court of Appeal did not, in spite of this statement, proceed to review any such evidence.

9. The Ruling of the California Supreme Court.

After the Court of Appeal denied rehearing (Appendix D), the defendant Standard Fire Insurance Company filed a petition for review in the California Supreme Court. (Appendix H.)

On September 2, 1993, the California Supreme Court denied the defendant's petition for review, thereby making the judgment of the trial court, affirmed by the Court of Appeal, final as to the State of California. (Appendix B.) However, the state Supreme Court ordered the Court of Appeal opinion not to be published, even though the Court of Appeal had certified it for publication. (Appendix B.)

After the denial of its petition for review, defendant Standard Fire Insurance Company satisfied portions of the judgment against it, including the award of contract damages, the award of extracontractual compensatory damages, the trial court costs, and interest on all of these items. The present petition for a writ of certiorari is therefore limited to the constitutional validity of the half million dollar award of punitive damages.

10. The Urgent Need for Review by This Court on a Writ of Certiorari.

The award of punitive damages in this case rests upon violation of the defendant's constitutional right to procedural due process of law. The award was based on a "fraud" finding, even though no fraud cause of action was in the pleadings at the time that trial began, and no claim of fraudulent conduct was alleged.

Punitive damages claims are increasingly common, and are growing like a cancer on the civil justice system. There is no easy solution to the crisis, but minimum standards of due process should be followed, before any award of punitive damages is permitted. At the very least, a defendant should receive notice of the charges on which a claim for punitive damages is based. No such notice was given to the defendant in this case, and the half million dollar award of punitive damages against it should be vacated and set aside.

ARGUMENT

I.

As Interpreted by State Courts in This Case, the California Punitive Damages Statute Allows Severe Punishment Based on a Finding of "Fraud," Without Proof of Any Fraud Cause of Action and Without Even Notice of Any Charge of Fraudulent Conduct.

The Fourteenth Amendment to the Constitution of the United States places procedural and substantive limits on the power of state courts to award punitive damages in litigation among private parties. *TXO Production Corporation v. Alliance Resources Corporation,* __ U.S. __, 113 S.Ct. 2711 (1993). The present case represents a test of the extent of those limits.

One component of procedural due process is notice concerning the danger of a punitive damages award. In *TXO,* this Court rejected the defendant's contention that "the procedure followed in . . . [the] case 'was unconstitutionally vague' because . . . [the defendant] had no notice of the possibility that the award of punitive damages might be divorced from an award of compensatory damages." __ U.S. __, 113 S.Ct. at 2724. It noted that a previous state appellate court opinion made the possibility quite clear. "In any event, the notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct." 113 S.Ct. at 2724. This Court found that the notice requirement had been satisfied in the *TXO* case.

The *TXO* opinion does not specify in detail the parameters of the constitutional requirement of notice. However, the language of the opinion suggests that there are two components, notice of the law governing punitive damages under particular circumstances, and notice of the factual charges against the defendant that constitute egregiously tortious conduct.

In the present case, the defendant received no notice of the interpretation of the "fraud" portion of the California punitive damages statute, and no notice of any claim that it had engaged in any fraudulent act, as defined in the statute. Thus, the defendant in the present case, unlike the one in *TXO,* had no warning with respect to the punitive damages award visited upon it.

Section 3294(a) of the *Civil Code* of California provides that:

> "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

This provision, with minor amendments, has been part of California law since the enactment of the *Civil Code* in 1872.

"Fraud" is defined in California *Civil Code* section 3294(c)(3) as "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise

causing injury." This definition was added to the statute in 1980.

In the long history of California jurisprudence, there is not a single reported decision permitting a defendant to be held liable for punitive damages based on a finding of "fraud," without establishment of a fraud cause of action. In *Orient Handel v. United States Fidelity & Guaranty Company,* 192 Cal.App.3d 684, 237 Cal.Rptr. 667 (1987), a trial court found willful misrepresentation on the part of the plaintiffs, and proceeded to award punitive damages in favor of the defendant, on the defendant's cross complaint. However, the Court of Appeal reversed, holding that the defendant's "award of punitive damages falls with its failure to prove justifiable reliance, an essential element of fraud." 192 Cal.App.3d at 697; 237 Cal.Rptr. at 674. The *Orient Handel* court observed that punitive damages are merely incident to a cause of action, and can never constitute the basis of one. 192 Cal.App.3d at 697; 237 Cal.Rptr. at 674.

In support of its conclusion that punitive damages could be awarded for fraud without any fraud cause of action, the Court of Appeal cited *Arzaga v. Villalba,* 85 Cal. 191, 24 P. 656 (1890) and *Haigler v. Donnelly,* 18 Cal.2d 674, 117 P.2d 331 (1941). Neither of these cases remotely supports the holding of the Court of Appeal. In *Arzaga,* the defendant accomplished conversion of property by means of fraud, and thus the cause of action against the defendant was a fraud cause of action as well as a conversion cause of action, and punitive damages were justified. The *Haigler* case is simply irrelevant, because the award of punitive damages was based on malice, not fraud.

The Supreme Court of California was undoubtedly disturbed by the unprecedented, unfair, and unconstitutional

interpretation of the punitive damages statute adopted by the trial court in this case and upheld by the Court of Appeal. In response, it "depublished" the Court of Appeal opinion.[7]

The effect of the Supreme Court's depublication order is to consign the Court of Appeal opinion to oblivion. Except in rare cases involving the same parties, an unpublished opinion "shall not be cited or relied upon by a court or a party in any other action or proceeding." Rule 977(a) of the California *Rules of Court.*

The practice of depublication appears to be unique to California, and has become very controversial in the state's legal circles. The practice has been vigorously defended in an article written by a sitting justice of the state Supreme Court, "The Depublication Practice of the Supreme Court," *Cal.L.Rev.*, Vol. 72, p. 514 (1984), by Joseph R. Grodin. Other authors, however, have been sharply critical. "Case Dispositions By the California Supreme Court: Proposed Alternatives," by Robb A. Scott and Karen J. Wagner, *Cal.L.Rev.*, Vol. 67, p. 788 (1979); "Decertification of Appellate Opinions: The Need for Articulated Judicial Reasoning and Certain Precedent in California Law," by Julie Hayward Biggs, *So.Cal.L.Rev.*, Vol. 50, p. 1181 (1977); "The Business of the California Supreme Court: A Comparative Study," by Karl Manheim, *Loyola of L. A. L. Rev.*, Vol. 26, p. 1085 (1993); "Making Decisions Disap-

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[7] Although the word "depublish" does not frequently appear in dictionaries, it has come into common usage in California. It refers to the practice of the state Supreme Court of directing opinions of the intermediate Courts of Appeal not to be published in the permanent bound *California Reports* after the Courts of Appeal have already certified them for publication.

pear: Depublication and Stipulated Reversal in the California Supreme Court," by Stephen R. Barnett, *Loyola of L. A. L. Rev.*, Vol. 26, p. 1013 (1993).

The principal defense of the practice of depublication is that the workload of the California Supreme Court is so heavy that the court is not able to accept all cases in which plain error appears in reported decisions of the intermediate Courts of Appeal. By depublication, erroneous holdings, such as that found in the interpretation of the state punitive damages statute by the Court of Appeal in this case, are rendered null and void for future cases. However, the decision of the Court of Appeal remains intact, and the party aggrieved by the erroneous holding of the Court of Appeal is left without a remedy in the state legal system.

Although the erroneous opinion of the Court of Appeal may no longer be cited in other cases, it remains binding on Standard Fire Insurance Company in this case. It has been held that a half million dollar award of punitive damages is permissible on the basis of a finding of "fraud," without any assertion of a fraud cause of action and without any notice of any charge of fraud on the part of the defendant. The defendant's constitutional right to notice of the applicable law and notice of the factual nature of the conduct charged has been violated. This clear violation by state courts is constitutionally unconscionable. Even if the California Supreme Court is too busy to protect the constitutional rights of the defendant, the Supreme Court of the United States should do so.

II.

Because the Constitutional Guarantee of Due Process of Law Requires Proper Notice of the Misconduct Charged, and of the Law that Has Been Violated, Before Penalties Are Assessed or Property Is Seized, the Award of Punitive Damages in the Present Case, Made Without Any Notice at All, Must Be Set Aside.

A classic statement of the constitutional right to notice can be found in *Lambert v. People of the State of California,* 355 U.S. 225 (1957). In *Lambert,* this Court declared that:

> "Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed." 355 U.S. at 228.

For this statement, the Court relied on cases which "involved only property interests in civil litigation." 355 U.S. at 228. However, the right to notice is "equally appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case." 355 U.S. at 228.

To be constitutionally sufficient, adequate notice must be given of legal proceedings, which must be reasonably calculated to inform parties of those proceedings which may directly and adversely affect their legally protected interests. *Walker v. City of Hutchinson,* 352 U.S. 112, 115-

116 (1956). See also, *Covey v. Town of Somers,* 351 U.S. 141 (1956).

In *Mullane v. Central Hanover Bank & Trust Company,* 339 U.S. 306 (1950), this Court overturned a state court decree settling accounts by the trustee of a common trust fund, on the ground that the notice given under state law was insufficient to satisfy the requirements of the Fourteenth Amendment. The Court observed that "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." 339 U.S. at 313. The notice in the *Mullane* case was insufficiently specific, because the beneficiaries of the trust in question were not notified of the right to have the trustee answer for negligent or illegal impairment of their interests. Furthermore, the beneficiaries were not notified about the fact that fees might be allowed that would diminish payments to them. 339 U.S. at 313.

The requirement of notice includes fair warning of what the law prohibits. *Bouie v. City of Columbia,* 378 U.S. 347 (1964). In addition, the particular conduct said to violate the law must be specified. *Stirone v. United States,* 361 U.S. 212 (1960); *Russell v. United States,* 369 U.S. 749 (1962). As noted above, the requirement of notice applies equally in civil and criminal cases.

Punitive damages are in the nature of "private fines levied by civil juries." *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 350 (1974). *International Brotherhood of Electrical Workers v. Foust,* 442 U.S. 42, 49 (1979). Moreover, punitive damages are quasi-criminal in character, but their

imposition is sometimes unaccompanied by the types of safeguards present in criminal proceedings. *Smith v. Wade,* 461 U.S. 30, 59 (1983) (dissenting opinion of Justice William H. Rehnquist, with Chief Justice Warren Burger and Associate Justice Louis Powell concurring). The purpose of punitive damages is to punish the defendant whose wrongful conduct was intentional or malicious, and to deter him and others from similar conduct in the future. *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 266-267 (1981).

In *Gray v. Raines,* 662 F.2d 569 (9th Cir. 1981), the United States Court of Appeals for the Ninth Circuit reversed a criminal conviction. The defendant had been charged with forcible rape. However, at the conclusion of the trial, the prosecution successfully sought a jury instruction on statutory rape. The defendant was acquitted of forcible rape, but convicted on the lesser offense, with which he had not been charged. The court held that the constitutional requirement of notice had been violated. Similarly, in this case, the issue of "fraud" was submitted to the jury after the close of evidence, without notice.

The civil equivalent of a criminal indictment is a complaint. Although this Court "has endorsed the modern relaxation of pleading rules, it has never receded from the requirement that civil complaints provide party's defendant with 'fair notice' of the claims against them." *New Motor Vehicle Board of the State of California v. Orrin W. Fox Company,* 439 U.S. 96, 125 (1978) (dissenting opinion of Justice John Paul Stevens, citing the unanimous opinion of the Court in *Conley v. Gibson* 355 U.S. 41 (1957)).

As noted above, the defendant never received any notice of the trial court's bizarre interpretation of the state's

punitive damages law, whereby such damages could be recovered, in this case only, on the basis of a finding of "fraud" without any fraud cause of action. Even worse, the pleadings of the plaintiff contained no allegation with respect to any intentional misrepresentation, deceit, or concealment of a material fact. There was nothing at all in the second amended complaint about detrimental reliance, whereby the plaintiff supposedly had been deprived of his property.

It is difficult to discern what evidence was relied upon by the jury, the trial judge, and the Court of Appeal in justifying the half million raid on the treasury of the defendant insurance company. It could not be evidence of the statements allegedly made by the plaintiff's insurance agent, since the plaintiff, at the time, had no property interest of which he could have been deprived, since the insurance contract in question had not yet been issued. Similarly, statements made to the plaintiff or his lawyers with respect to the claimed lack of coverage did not deprive the plaintiff of any property or legal rights. In virtually every civil case, the defendant makes statements denying liability. The defendant's statements do not deprive the plaintiff of anything; it is the defendant's refusal to pay that does so.

Even if there were evidence of "fraud" in the voluminous record, there was still a violation of the constitutional right to notice. There never was any notice of the interpretation of the law that would be applied, and there was no notice in the pleadings of any claim of fraudulent conduct.

The facts of the present case are easily distinguished from those in *TXO Production Corporation v. Alliance*

Resources Corporation, __ U.S. __, 113 S.Ct. 2711 (1993). In *TXO,* unlike the present case, there was ample notice of the relevant law, in the statutory and decisional law of West Virginia. Moreover, it appears that the defendant held liable for punitive damages had sufficient notice in the pleadings of the adverse party of the egregious conduct charged, since there was not even a claim that the adverse party's pleadings were defective.

The law of punitive damages does not represent an exception to the constitutional right of notice. Like every other defendant, an insurance company is entitled to appropriate warning before its property can be looted. Claims for punitive damages are now rampant, but they must be subject to procedural due process.

III.

In Light of the Continuing Punitive Damages Crisis in the Nation's Courts, and in View of the Magnitude of the Constitutional Violation in This Case, Certiorari Should Be Granted in Order to Ensure Justice for All Defendants Threatened with Confiscation of Their Property Without Notice of Any Claim of Wrongdoing.

For a variety of reasons, there has been an enormous increase in punitive damages litigation. The number of cases in which such damages are sought has skyrocketed, along with the amounts of money awarded. However, neither state nor federal law has adequately protected defendants from arbitrary punishment at the hands of hostile juries.

Many defendants whose property has been pilfered by aggressive plaintiffs and their lawyers have sought refuge in the federal Constitution. Recent decisions of this Court attest to the magnitude of the punitive damages crisis, including *Aetna Life Insurance Company v. Lavoie,* 475 U.S. 813 (1986); *Bankers Life and Casualty Company v. Crenshaw,* 486 U.S. 71 (1988); *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257 (1989); *Pacific Mutual Life Insurance Company v. Haslip,* 499 U.S. 1 (1991); and *TXO Production Corporation v. Alliance Resources Corporation,* __ U.S. __, 113 S.Ct. 2711 (1993). The facts of these cases vary considerably, but each of them involved a substantial award of punitive damages at the whim of a jury. Arbitrary awards may or may not, however, violate the Constitution.

The extent of the punitive damages crisis is difficult to measure nationally. In California, there is at least some information available. Prior to 1960, the largest award of punitive damages upheld on appeal was $10,000.00. *Larrick v. Gilloon,* 176 Cal.App.2d 408, 1 Cal.Rptr. 360 (1959), overruled on other grounds by *Field Research Corporation v. Superior Court of San Francisco,* 71 Cal.2d 110, 77 Cal.Rptr. 243 (1969). In the 1960's, the highest award affirmed was 25 times greater, an award of $250,000.00, in *Toole v. Richardson-Merrell, Inc.,* 251 Cal.App.2d 689, 60 Cal.Rptr. 398 (1967). For the 1970's, the highest reported award that was upheld was $740,000.00, in *Neal v. Farmers Insurance Exchange,* 21 Cal.3d 910, 148 Cal.Rptr. 389 (1979). In the 1980's and 1990's, there has been a literal explosion in the frequency and size of punitive damages awards in California. An award of $5,000,000.00 in punitive damages was upheld in an insurance "bad faith" case, *Downey Savings and Los Association v. The Ohio Casualty*

Insurance Company, 189 Cal.App.3d 1072, 234 Cal.Rptr. 835 (1987), *cert. denied*, 486 U.S. 1036 (1988).

Perhaps the most comprehensive study of punitive damages awards in California is that entitled "Punitive Damages: Empirical Findings," by Mark Peterson, Syam Sarma, and Michael Shanley, which was published in 1987 by the *Institution for Civil Justice of the Rand Corporation.* According to the *Rand* study, "[i]n one out of every ten trials in major urban California jurisdictions where defendants were found liable for compensatory damages, juries also assessed punitive damages." (Page 33.) Awards of punitive damages were largest in Los Angeles County, where the average such award was $1.3 million. (Page 36.) In California as a whole between 1980 and 1984, jurors awarded $311,000,000.00 in punitive damages. (Page 42.)

There is no easy solution to the punitive damages crisis, which is plaguing the entire court system. The Constitution does not prohibit loose legal standards in state courts. It does not always forbid appeals to prejudice against insurance companies, manufacturers, banks, or other unpopular institutions. Nonetheless, this Court should ensure minimum standards of procedural due process of law. Even unpopular defendants should be given notice of the charges against them, before their property is appropriated.

The plaintiff and the courts of California ran roughshod over the rights of the Standard Fire Insurance Company in this case. This Court should intervene to rectify the violation of the defendant's right to notice. It would therefore afford procedural due process to other defendants threatened with punitive damage claims, without any specification of a claim of wrongdoing.

IV.

Conclusion.

If there is any substance to the constitutional right to notice before forfeiture of a defendant's property, then relief should be granted to the petitioner in this case. There has been a substantial award of punitive damages against the petitioner without warning as to the legal standard for awarding such damages, and without notice of any charges of wrongdoing.

It is respectfully submitted that the Supreme Court of the United States should grant this petition for a writ of certiorari, in order consider the issue presented. Thereafter, this Court should reverse the decision of the California Court of Appeal, and nullify the unconstitutional award of punitive damages.

Respectfully submitted,

HAIGHT, BROWN & BONESTEEL, and
Roy G. Weatherup

Attorneys for Petitioner
STANDARD FIRE INSURANCE COMPANY

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on November 24, 1993, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail, at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(*By Express Mail: Original and 40 Copies*)

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Clerk of the Superior Court for
the County of Los Angeles
Honorable Richard G. Harris, Judge
1725 Main Street, Department P
Santa Monica, California 90401

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 24, 1993, at Los Angeles, California.

Betty J. Malloy
(Original Signed)